No. 16-1094

In the Supreme Court of the United States

REPUBLIC OF SUDAN, PETITIONER

v.

RICK HARRISON, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether a service packet is "addressed and dispatched * * * to the head of the ministry of foreign affairs" of a foreign state, as required by 28 U.S.C. 1608(a)(3), when the service packet is sent by registered mail to the head of the ministry of foreign affairs of the foreign state at the state's embassy in the United States.

PARTIES TO THE PROCEEDING

Petitioner is the Republic of Sudan. Respondents are Rick Harrison; John Buckley, III; Margaret Lopez; Andy Lopez; Keith Lorensen; Lisa Lorensen; Edward Love; Robert McTureous; David Morales; Gina Morris; Martin Songer, Jr.; Shelly Songer; Jeremy Stewart; Kesha Stidham; Aaron Toney; Eric Williams; Carl Wingate; and Tracey Smith, as personal representative of the estate of Rubin Smith.

Petitioner lists numerous additional entities in the addendum to its brief. Those entities were not parties to the proceeding in the court of appeals, and they are therefore not parties to the proceeding in this Court under Rule 13.6.

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Air France v. *Saks*, 470 U.S. 392 (1985) 43

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Alberti v. *Empresa Nicaraguense de La Carne*, 705 F.2d 250 (7th Cir. 1983) 31
Autotech Technologies LP v. *Integral Research & Development Corp.*, 499 F.3d 737 (7th Cir. 2007), cert. denied, 552 U.S. 1231 (2008) 31
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BG Group, PLC v. *Republic of Argentina*, 572 U.S. 25 (2014) 47
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Hamdan v. *Rumsfeld*, 548 U.S. 557 (2006) 47
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IBP, Inc. v. *Alvarez*, 546 U.S. 21 (2005) 21
Iselin v. *United States*, 270 U.S. 245 (1926) 22
Kimbrough v. *United States*, 552 U.S. 85 (2007) 23
Kolovrat v. *Oregon*, 366 U.S. 187 (1961) 46

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Cases—continued:

Kumar v. *Republic of Sudan*:
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Civ. No. 10-171 (E.D. Va. Oct. 25, 2016) 7, 14, 21
Kuwait Airways Corp. v. *Iraqi Airways Co.*, [1995] 1 WLR 1147 (U.K. H.L.) 43
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Medellin v. *Texas*, 552 U.S. 491 (2008) 38
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410 Fed. Appx. 581 (4th Cir. 2011) 7
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495 F. Supp. 2d 541 (E.D. Va. 2007) 7, 8
Civ. No. 04-428, 2005 WL 2086202 (E.D. Va. Aug. 26, 2005) 21
Sebelius v. *Cloer*, 569 U.S. 369 (2013) 24, 36
Sebina v. *South African High Commission*, [2010] 3 BLR 723 IC (Botswana Indus. Ct.) 43

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Cases—continued:

Sistem Mühendislik Insaat Sanayi Ve Ticaret Anomic Sirketi v. *Kyrgyz Republic*, 2015 ONCA 447 (Can. Ont. C.A.) 43
Sumitomo Shoji America, Inc. v. *Avagliano*, 457 U.S. 176 (1982) 46
Terrorist Attacks on September 11, 2001, In re, MDL No. 03-1570 (S.D.N.Y.) 45
Transaero, Inc. v. *La Fuerza Aerea Boliviana*, 30 F.3d 148 (D.C. Cir. 1994), cert. denied, 513 U.S. 1150 (1995) 31, 32
United States v. *Union Pacific Railroad*, 91 U.S. (1 Otto) 72 (1875) 22
Village Holdings Sdn. Bhd. v. *Her Majesty the Queen in Right of Canada*, [1988] 2 MLJ 656 (Malaysia H.C.) 43
Water Splash, Inc. v. *Menon*, 137 S. Ct. 1504 (2017) 37, 46
Whitney v. *Robertson*, 124 U.S. 190 (1888) 36

Statutes, treaty, regulations, and rules:

Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1441(d), 1602-1611 ..... *passim*
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28 U.S.C. 1607 5
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28 U.S.C. 1608(a)(4) ..... *passim*
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28 U.S.C. 1608(b)(2) 28, 29
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28 U.S.C. 1254(1) 2
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28 U.S.C. 1963 10
33 U.S.C. 912(c) 23
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Fed. R. Civ. P. 4(i)(1)(B) 23
Fed. R. Civ. P. 55(a) 7
Fed. R. Civ. P. 55(c) 27
Fed. R. Civ. P. 60(b) 13

Miscellaneous:

Anthony Aust, *Handbook of International Law* (2d ed. 2010) 28
122 Cong. Rec. 2120 (1973) 48
Ludwik Dembinski, *The Modern Law of Diplomacy* (1988) 20
Eileen Denza, *Diplomatic Law* (4th ed. 2016) 40, 46, 48

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Miscellaneous—continued:

Department of Justice, *Service of Process on the United States Government* (Nov. 4, 2016) <tinyurl.com/usgservice> 51
Department of State, *Contact Us* <tinyurl.com/clearanceaddress> (last visited Sept. 18, 2018) 25
Department of State, *Service of Legal Process by Mail on Foreign Governments in the United States*, 71 Dep't St. Bull., No. 1840 (Sept. 30, 1974) 48
Department of State, *State Sponsors of Terrorism* <tinyurl.com/statesponsors> (last visited Sept. 18, 2018) 7
District of Columbia, Office of the Secretary <tinyurl.com/dcsecretary> (last visited Sept. 18, 2018) ..30
Embassy of the Republic of Sudan in the United States, *Sudan's Foreign Policy* <tinyurl.com/sudaneseembassy> (last visited Sept. 18, 2018) 20
Rolf Einar Fife & Kristian Jervell, *Elements of Nordic Practice 2000: Norway*, 70 Nordic J. Int'l L. 531 (2001) 38, 45
G.A. Res. 1450 (XIV) (Dec. 7, 1959) 40
William L. Griffin, *Adjective Law and Practice in Suits Against Foreign Governments*, 36 Temp. L.Q. 1 (1962) 45
H.R. 11315, 94th Cong. (1975) 37
H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976) 50
Ernest L. Kerley, *Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities*, 56 Am. J. Int'l L. 88 (1962) 42
Letter from Leonard C. Meeker, Acting Legal Adviser, Department of State, to John W. Douglas, Assistant Attorney General, Department of Justice (Aug. 10, 1964) 48

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Miscellaneous—continued:

Andreas F. Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U. L. Rev. 901 (1969) 45
Ferdinand Mesch, *Jurisdictional Immunities of Foreign States*, 23 DePaul L. Rev. 1225 (1974) 45
Oxford English Dictionary (1st ed. 1933) 19
Richard Crawford Pugh & Joseph McLaughlin, *Jurisdictional Immunities of Foreign States*, 41 N.Y.U. L. Rev. 25 (1966) 45
Random House Dictionary (1973) 19
Report of the International Law Commission Covering the Work of Its Ninth Session, 23 April-28 June 1957, 12 U.N. GAOR Supp. No. 9, U.N. Doc. A/3623 (1957), reprinted in [1957] 2 Y.B. Int'l L. Comm'n 131, U.N. Doc. A/CN.4/SER.A/1957/Add.1 ..... 39, 40
Report of the International Law Commission Covering the Work of Its Tenth Session, 28 April-4 July 1958, 13 U.N. GAOR Supp. No. 9, U.N. Doc. A/3859 (1958), reprinted in [1958] 2 Y.B. Int'l L. Comm'n 78, U.N. Doc. A/CN.4/SER.A/1958/Add.1 ..... 40, 48
S. 566, 93d Cong. (1973) 50
Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 21, 22, 26
Summary Records of the Tenth Session of the International Law Commission, [1958] 1 Y.B. Int'l L. Comm'n, U.N. Doc. A/CN.4/SER.A/1958 ..... 40, 41, 42
United Nations Conference on Diplomatic Intercourse and Immunities, *Summary Records of Plenary Meetings and Meetings of the Committee of the Whole*, U.N. Doc. A.CONF.20/14 (Vol. I) (1962) 41, 42, 48

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Miscellaneous—continued:

United Nations Conference on Diplomatic Intercourse and Immunities, ***Annexes, Final Act, Vienna Convention on Diplomatic Relations, Optional Protocols, Resolutions,*** U.N. Doc. A/CONF.20/14/Add.1 (Vol. II) (1962) 41

Webster's Second New International Dictionary (1959) 19

Marjorie M. Whiteman, ***Digest of International Law*** (1970) 37, 48

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 168-189) is reported at 802 F.3d 399. The opinion of the court of appeals denying panel rehearing (J.A. 207-230) is reported at 838 F.3d 86. The orders of the district court (J.A. 149-164) are unreported. The underlying opinion of the United States District Court for the District of Columbia entering a default judgment in favor of respondents (J.A. 84-139) is reported at 882 F. Supp. 2d 23.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 2015. A petition for panel rehearing was denied on September 22, 2016 (J.A. 207-230), and a petition for rehearing en banc was denied on December 9, 2016 (J.A. 231-232). The petition for a writ of certiorari was filed on March 9, 2017, and granted on June 25, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The relevant provision of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1608(a), provides:

> Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:
>
> > (1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or
> >
> > (2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or
> >
> > (3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

> (4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.
>
> As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

STATEMENT

This case concerns one of the provisions of the Foreign Sovereign Immunities Act governing service of process on a foreign state. Under 28 U.S.C. 1608(a)(3), a plaintiff may effect service by having a service packet "addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." The question presented here is whether that provision contains an additional, unstated requirement that a service packet addressed to the foreign minister be sent to him at the address of the foreign ministry in the foreign state.

Respondents are sailors and spouses of sailors wounded during the bombing of the USS *Cole*, the naval destroyer that was attacked by al Qaeda terrorists in 2000. Petitioner is the Republic of Sudan, a state sponsor of terrorism that harbored Osama bin Laden and other

members of al Qaeda. Respondents sued petitioner under the FSIA in the United States District Court for the District of Columbia, alleging that petitioner had provided material support to al Qaeda for the attack. Although petitioner had participated in earlier litigation by victims of the *Cole* bombing, it failed to appear in the District of Columbia action. After an evidentiary hearing, the district court entered a default judgment in favor of respondents.

Respondents subsequently secured turnover orders in the United States District Court for the Southern District of New York. After entering its first appearance in the litigation, petitioner appealed the turnover orders. As is relevant here, petitioner contended that service of process in the underlying proceedings was improper because the clerk of the court sent the service packet to petitioner's foreign minister at the Sudanese embassy in the United States, rather than at the foreign ministry in Khartoum.

The court of appeals affirmed. Rejecting petitioner's argument, the court of appeals reasoned that the relevant provision of the FSIA was "silent" as to the specific location where the mailing was to be sent; "[i]f Congress had wanted to require that the mailing be sent to the head of the ministry of foreign affairs in the foreign country, it could have said so." J.A. 178. The court of appeals' interpretation of the FSIA was correct, and its judgment should therefore be affirmed.

A. Background

1. The Foreign Sovereign Immunities Act authorizes suits against foreign states designated as state sponsors of terrorism that have provided material support for terrorist acts committed against American nationals. See 28 U.S.C. 1605A. For such suits, the FSIA confers subject-matter jurisdiction on the federal courts and provides that the foreign state is not immune from suit. See 28 U.S.C.

1330(a), 1604-1607. The current version of the FSIA authorizes the recovery of economic, noneconomic, and punitive damages. See 28 U.S.C. 1605A(c).

2. The FSIA also sets out the exclusive means for effecting service of process on a foreign state in cases in which the state is subject to suit. See 28 U.S.C. 1608(a). The statute prescribes four methods of service in descending order of preference; a plaintiff must attempt service by the first method, or determine that it is unavailable, before proceeding to the second and successive methods. See *ibid.*

Initially, a plaintiff is required to serve process "in accordance with any special arrangement for service between the plaintiff and the foreign state": for example, if there is a contract that specifies a method of service. 28 U.S.C. 1608(a)(1). If there is no such arrangement, the plaintiff may effect service "in accordance with an applicable international convention on service of judicial documents." 28 U.S.C. 1608(a)(2).

If there is no such convention, the plaintiff may then serve process under the provision at issue here, by

> sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned.

28 U.S.C. 1608(a)(3). If service cannot be made within thirty days under that provision, a plaintiff may have the service documents "addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of

Special Consular Services," for transmission to the foreign state. 28 U.S.C. 1608(a)(4). Service of process under the FSIA, combined with subject-matter jurisdiction, confers personal jurisdiction over the foreign state. See 28 U.S.C. 1330(b).

B. Facts And Procedural History

1. This case arises out of one of the worst terrorist atrocities committed against the men and women who serve our country. On October 12, 2000, al Qaeda terrorists attacked the USS *Cole*, a naval destroyer, as it was refueling in the Port of Aden, Yemen. Suicide bombers in a small fiberglass boat approached the *Cole* and detonated their explosives. The blast, which hit when many of the crew were sitting down to lunch, blew a gaping hole in the port side of the ship. J.A. 95.

The bombing killed seventeen American sailors and wounded forty-two others. Fifteen men and two women (including the mother of a two-year-old) were among the dead; they ranged in age from 19 to 35. The injured included a sailor who suffered a "right femur [that] was broken four inches above the knee and had been completely folded behind his back so that his foot was now located near his head," and another who received burns to her face, neck, arms, and legs so severe that they took years to heal. J.A. 95, 106, 109.

For more than a decade, the victims of the *Cole* bombing and their families have engaged in tireless efforts to seek justice and to obtain compensation for their losses. Those efforts have focused on the Republic of Sudan, a rogue nation with a long history of harboring international terrorist groups. The leader of al Qaeda, Osama bin Laden, lived in Sudan for much of the 1990s. In 1993, the State Department designated Sudan a state sponsor of terrorism for its support of those groups. Today, Sudan

is one of only four countries still on that list, joined by Iran, Syria, and North Korea. See Department of State, *State Sponsors of Terrorism* <tinyurl.com/statesponsors> (last visited Sept. 18, 2018).

In 2004, family members of the deceased *Cole* sailors filed suit against Sudan in the United States District Court for the Eastern District of Virginia, alleging that Sudan had provided material support to al Qaeda for the attack. See *Rux* v. *Republic of Sudan*, Civ. No. 04-428 (filed July 16, 2004).

Sudan initially failed to appear, and the district court entered a default. See Fed. R. Civ. P. 55(a). Sudan later entered an appearance; it challenged the default, moved to dismiss, and then appealed from the district court's denial of its motion. See *Rux* v. *Republic of Sudan*, 461 F.3d 461, 466 (4th Cir. 2006), cert. denied, 549 U.S. 1208 (2007). Unsuccessful in all of those efforts, Sudan then thumbed its nose at the court, directing its attorneys not to participate in further proceedings. See *Rux* v. *Republic of Sudan*, 410 Fed. Appx. 581, 583 (4th Cir. 2011); D. Ct. Dkt. 176, at 35-37, *Kumar* v. *Republic of Sudan*, Civ. No. 10-171 (E.D. Va.). The district court ordered Sudan to file responsive pleadings on three separate occasions, but Sudan refused to do so. See D. Ct. Dkt. 176, at 35-37, *Kumar*, *supra*; D. Ct. Dkt. 53, 72, 116, *Rux*, *supra*.

The district court conducted a bench trial (which Sudan's counsel attended) and then entered judgment in favor of the plaintiffs. See *Rux* v. *Republic of Sudan*, 495 F. Supp. 2d 541, 543-544 (E.D. Va. 2007). In a lengthy written opinion, the court found that Sudan had provided critical assistance to al Qaeda and to bin Laden. See *id.* at 549-550. The court further determined that Sudan's actions had meaningfully contributed to the attack on the *Cole*, which was carried out by al Qaeda under bin Laden's direct supervision. See *id.* at 552-554. The court awarded

economic damages to the plaintiffs—the only damages available at the time. See *id.* at 565-569.

After the district court's decision, Congress amended the FSIA, expanding the available damages against state sponsors of terrorism to include noneconomic and punitive damages. See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 338-341 (codified at 28 U.S.C. 1605A). In 2010, the original *Rux* plaintiffs and other family members filed a new action against Sudan in the Eastern District of Virginia to take advantage of the broader category of damages now available. See *Kumar* v. *Republic of Sudan*, 880 F.3d 144, 151 (4th Cir. 2018), petition for cert. pending, No. 17-1269 (filed Mar. 9, 2018).

2. A few months later, respondents, a group of sailors injured in the bombing and their spouses, filed suit against Sudan in the United States District Court for the District of Columbia. As did the plaintiffs in the other cases, respondents invoked the court's jurisdiction under the FSIA, alleging that Sudan had provided material support to al Qaeda for the attack. J.A. 171.

Because respondents had no special arrangement with Sudan for service of process and because Sudan was not a party to any applicable international convention, the first two methods of service prescribed by the FSIA were unavailable. Accordingly, respondents, like the plaintiffs in the other cases, sought to serve Sudan by mail under 28 U.S.C. 1608(a)(3). J.A. 88, 171-172.

At respondents' request, the clerk of the court sent the necessary documents by certified mail, return receipt requested, to:

Republic of Sudan
Deng Alor Koul
Minister of Foreign Affairs
Embassy of the Republic of Sudan
2210 Massachusetts Avenue NW
Washington, DC 20008

J.A. 171-172. The clerk certified on the docket that the service packet had been sent to the head of the ministry of foreign affairs at the Sudanese embassy and that the signed receipt had been returned. Accordingly, the district court found that Sudan had "accepted service." Shortly after the service packet was delivered, an official from the Sudanese embassy met with counsel for respondents to discuss a potential resolution of the case. J.A. 88, 172; C.A. Dkt. 104, Ex. A, ¶¶ 2-4.

Despite accepting service (and despite selectively participating in the earlier *Rux* litigation), Sudan failed to enter an appearance or to participate in the proceedings. Respondents then obtained a default against Sudan. J.A. 88, 172.

3. Following the entry of default, the District of Columbia district court held an evidentiary hearing and then entered a default judgment in favor of respondents. J.A. 84-139. Like the *Rux* court, the district court found that Sudan had provided al Qaeda and bin Laden with substantial logistical and financial support: for example, by providing al Qaeda with diplomatic pouches to carry weapons across borders undetected; issuing diplomatic passports to al Qaeda members to facilitate their international travel; convening conferences where bin Laden and other terrorist leaders could plan terrorist activities; and financing terrorist training camps in Sudan. J.A. 96-104. The court further determined that Sudan's actions were

"critical" both to al Qaeda's development into a sophisticated terrorist network and to the attack on the *Cole* specifically. J.A. 102-104.

In calculating damages, the district court emphasized the severity of respondents' injuries. J.A. 104-123. The court ultimately awarded approximately $78 million in compensatory damages and $236 million in punitive damages. J.A. 81-82.

Respondents requested that the clerk of the court mail a copy of the court's judgment to Sudan's foreign minister at the Sudanese embassy in Washington, and the clerk certified that she had done so. J.A. 142-143, 172-173.

4. In 2012, respondents registered their judgment in the United States District Court for the Southern District of New York under 28 U.S.C. 1963, seeking to satisfy the judgment through orders to various banks to turn over Sudanese assets frozen under the then-applicable sanctions regime. Both the District of Columbia and New York district courts certified that a reasonable period of time had elapsed from entry of the judgment for respondents to execute on and attach Sudanese assets. Sudan did not challenge those certifications. J.A. 173-174.

A few months later, the New York district court issued the turnover orders that are the subject of this case. Sudan then entered its first appearance in this litigation: it filed notices of appeal from the turnover orders, claiming that the underlying judgment entered in the District of Columbia was void for lack of personal jurisdiction on the ground that the service packet had been sent to the foreign minister at the Sudanese embassy in the United States, rather than at the foreign ministry in Khartoum. J.A. 174-175.

5. The court of appeals affirmed. J.A. 168-189. As is relevant here, the court held that mailing the service packet to the foreign minister at the Sudanese embassy in

the United States complied with the requirements of Section 1608(a)(3). J.A. 175-183.

The court of appeals explained that Section 1608(a)(3), on its face, requires that the service packet be mailed "to the head of the ministry of foreign affairs," but that the statute "is silent as to a specific location where the mailing is to be addressed." J.A. 178 (citation omitted). The court reasoned that, "[i]f Congress had wanted to require that the mailing be sent to the head of the ministry of foreign affairs in the foreign country, it could have said so." *Ibid.* Congress did just that in the following provision, the court observed, when it "specified that the papers be mailed 'to the Secretary of State in Washington, District of Columbia.'" J.A. 178-179 (quoting 28 U.S.C. 1608(a)(4)). The court reasoned that "[n]othing in [Section] 1608(a)(3) requires that the papers be mailed to a location in the foreign state," and it added that "service on a minister of foreign affairs via an embassy address constitutes literal compliance with the statute." J.A. 179.

The court of appeals then addressed the legislative history of Section 1608(a)(3). The court found the legislative history to be "sparse" and to "shed[] little light on the question" whether service could be sent to a foreign minister at the foreign state's embassy. J.A. 181. The court noted the House Report on the FSIA had suggested that service on an embassy would be inconsistent with the Vienna Convention on Diplomatic Relations, which provides that "[t]he premises of [a] mission shall be inviolable" and that "[a] diplomatic agent shall * * * enjoy immunity." J.A. 181-182 (citation omitted). But, the court explained, it did "not see how principles of mission inviolability and diplomatic immunity are implicated" by "service on the foreign minister *via* [an] embassy address." J.A. 182. Because "service was directed to the right individual, using the Sudanese Embassy address for transmittal," the

court concluded that respondents had "complied with the plain language of the FSIA's service of process requirements at 28 U.S.C. § 1608(a)(3)." J.A. 182-183.

6. Sudan filed a petition for rehearing; the United States filed an amicus brief supporting the petition. The court of appeals denied Sudan's petition for panel rehearing without recorded dissent, issuing a new opinion in which it addressed the government's arguments. J.A. 207-230.

The court of appeals again explained that, "[o]n its face, the statute does not specify a location where the papers are to be sent; it specifies only that the papers are to be addressed and dispatched to the head of the ministry of foreign affairs." J.A. 213. The court emphasized that "[a] mailing addressed to the minister of foreign affairs via Sudan's embassy in Washington, D.C., was consistent with the language of the statute." J.A. 214. It again declined "to read the words 'at his or her regular place of work' or 'at the state's seat of government' into the statute." J.A. 215-216.

The court of appeals reiterated that the packet was not served *on* the embassy as an agent for Sudan; instead, it was mailed to the foreign minister *via* the embassy, a "natural" way of reaching him. J.A. 216-217. If the embassy did not believe that the minister could be reached at its address, it could have "rejected the mailing." *Ibid.* Instead, the court noted, it "accepted the papers" on behalf of the foreign minister and "explicitly acknowledged receipt." J.A. 217.

The court of appeals then addressed the new argument that its interpretation of Section 1608(a)(3) would "place[] the United States in violation of the Vienna Convention." J.A. 220-221. The court noted that the relevant provisions of the Vienna Convention "preclude service of

process on an embassy or diplomat as an agent of a foreign government." J.A. 222. But "that is not what happened here." *Ibid.* The service at issue did not implicate the Vienna Convention, the court explained, because "process was served on the Minister of Foreign Affairs at the foreign mission and not on the foreign mission itself or the ambassador." *Ibid.*

The court of appeals further recognized the United States' policy of rejecting service delivered to its embassies abroad, but it explained that its interpretation of Section 1608(a)(3) "does not affect this policy." J.A. 222. The court made explicit that the United States and any other country may enforce a "policy of refusing to accept service via its embassies." *Ibid.* Sudan, however, "did not elect to follow any such policy" and "did not reject the service papers," as it could "easily" have done. J.A. 223.

Finally, the court of appeals rejected Sudan's arguments, raised for the first time in its reply brief at the rehearing stage, that the service packet was not actually accepted by Sudan or delivered to the Sudanese minister of foreign affairs. J.A. 225-226. The court held that this argument came too late and was "not properly before [the court]." J.A. 226. Accordingly, its resolution of the legal issue turned on the undisturbed premise that the embassy "accepted the papers" addressed to the foreign minister, "signing for them and sending back a return receipt" to the clerk. J.A. 216.

The court of appeals subsequently denied Sudan's petition for rehearing en banc without recorded dissent. J.A. 231-232.[1]

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[1] While its appeal was still pending in the court of appeals, Sudan entered an appearance in the District of Columbia district court and moved to vacate the underlying judgment under Federal Rule of Civil Procedure 60(b); it raised several arguments, including the argument

7. The new lawsuit filed by the original *Rux* plaintiffs, meanwhile, proceeded in much the same manner, but with the opposite result. At the plaintiffs' request, the clerk of the court sent the necessary documents by certified mail, return receipt requested, to Sudan's minister of foreign affairs at the Sudanese embassy in Washington. See *Kumar*, 880 F.3d at 151. The embassy accepted the service packet and signed the certified-mail receipt. See *ibid.*

As in this case, Sudan initially failed to appear, and the district court entered a default judgment against it. See *Kumar*, 880 F.3d at 151. Sudan then entered an appearance and moved to vacate the default judgment on the ground that service was improper. See *id.* at 152. The district court denied Sudan's motion, expressly agreeing with the court of appeals' reasoning in this case and holding that "the text of [Section] 1608(a)(3) does not prohibit service on the Minister of Foreign Affairs at an embassy address." Dkt. 176, at 28-29, *Kumar*, *supra*.

The Fourth Circuit reversed and remanded. See *Kumar*, 880 F.3d at 150. It acknowledged that the text of the FSIA does not specify a location where the service packet must be sent, but it nevertheless held that the packet must be sent to the foreign minister at the address of the foreign ministry in the foreign state in order to be effective. See *id.* at 155. The plaintiffs filed a petition for a writ of certiorari, which is currently pending before this Court. See No. 17-1269 (filed Mar. 9, 2018).

The plaintiffs in *Kumar* have since attempted to serve Sudan by sending service packets to Sudan's foreign minister at the foreign ministry in Khartoum. Consistent with its tactics throughout the *Cole* litigation, however,

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concerning service at issue here. See Dkt. 55-1, at 29-31, *Harrison* v. *Republic of Sudan*, Civ. No. 10-1689 (D.D.C.). That motion remains pending.

Sudan did not sign the return receipts. See D. Ct. Dkt. 213, at 3 n.2, *Kumar*, *supra*. The plaintiffs obtained an extension of the court-ordered deadline for service and are now attempting to serve process on Sudan, at great cost, through diplomatic channels under Section 1608 (a)(4). See *id.* at 3-5.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the relevant provision of the FSIA, Section 1608(a)(3), does not contain an additional, unstated requirement that a service packet addressed to a foreign minister be sent to him at the address of the foreign ministry in the foreign state. The judgment of the court of appeals should therefore be affirmed.

A. Section 1608(a)(3) requires that a service packet be "addressed and dispatched" to the foreign minister. See 28 U.S.C. 1608(a)(3). That language requires that the service packet be directed to the foreign minister ("addressed") and sent to him in an expeditious manner ("dispatched"). It does not mandate a particular location where the packet should be sent.

It is a rudimentary principle of statutory interpretation that, where a statute omits a requirement, the requirement cannot be supplied by the courts. So too here. That principle has particular force in interpreting Section 1608(a)(3) because Congress did include a location requirement in the very next paragraph, requiring the packet to be addressed and dispatched to the Secretary of State "in Washington, District of Columbia." Congress also specified a location in numerous other service provisions in the United States Code. Petitioner's interpretation would rewrite Section 1608(a)(3) to add a requirement that Congress knew how to include but chose to omit.

B. Petitioner's contrary arguments are unavailing. It contends that the term "addressed" is naturally read to preclude service at the foreign state's embassy. But that is incorrect. A statute could easily provide for service addressed and dispatched to the foreign minister "at the foreign state's American embassy," precisely because nothing in the phrase "addressed and dispatched" forecloses that location.

Nor can petitioner get to its desired interpretation by pointing to the "signed receipt" requirement. Because a service packet is ordinarily accepted and signed for by a mailroom employee, the signed receipt establishes only that the foreign state has accepted the service packet on the foreign minister's behalf. The same is true regardless of whether the service packet is sent to the embassy or to the foreign ministry. And if timely delivery to the foreign minister does not occur, the foreign state can challenge any resulting default, and even a subsequent entry of a default judgment, by coming forward with a valid justification.

Petitioner's policy arguments similarly lack merit. Permitting a service packet to be mailed to the foreign minister at the embassy address does not place an improper burden on the embassy, which can decline to sign for a packet addressed to the foreign minister if it does not wish to transmit the packet. In this case, the clerk of the court certified that petitioner had signed for the packet, thereby implicitly agreeing to transmit it to the addressee. Under those circumstances, it would be grossly unfair to hold that respondents failed to perfect service simply because they failed to intuit and then comply with petitioner's additional, atextual requirement.

C. Petitioner, joined by the government, heavily relies on the argument that its proposed interpretation is required to avoid a conflict with the Vienna Convention on

Diplomatic Relations. As a preliminary matter, because the text of Section 1608(a)(3) is unambiguous, the Vienna Convention is irrelevant here.

In any event, petitioner and the government badly misconstrue the Convention. Article 22, which establishes the inviolability of diplomatic premises, says nothing about service by mail. Mailing is not a trespass; mail routinely arrives at embassies without raising questions under the Convention.

In arguing to the contrary, petitioner and the government rely on language in a preliminary 1957 report of the International Law Commission. Astoundingly, however, they fail to mention that the final 1958 report of the Commission takes the opposite position, clarifying that Article 22 does not prevent service by mail. Just as astoundingly, petitioner and the government ignore a recent decision of the Supreme Court of the United Kingdom, a sister signatory to the convention, which held that the Vienna Convention does not prohibit the service of process by mail at diplomatic premises. That is decidedly the better view, and the plain-text interpretation of Section 1608(a)(3) is therefore consistent with the Vienna Convention. Particularly because the government has taken inconsistent positions on the interpretation of the Vienna Convention (yet another inconvenient fact the government ignores), its current position is entitled to little weight.

D. Because of the text of Section 1608(a)(3) is unambiguous, this Court should not consider the legislative history. In any event, the legislative history sheds little light on the question in this case. While petitioner and the government cite the House Judiciary Committee's report, that report seemingly addresses the discrete issue of service on an ambassador. Petitioner's insistence that Con-

gress intended to foreclose service at the embassy address is belied by Congress's silence on the question in Section 1608(a)(3).

E. Finally, the government contends that its interpretation is necessary to protect an interest in reciprocal treatment. But the government ignores the fact that the United States does not accept process *in any manner* contemplated by Section 1608(a)(3)—whether at an embassy or even at the State Department itself. As a result, the government has no institutional stake in the outcome of the question presented.

Under those circumstances, it is mind-boggling that the government has decided in this case to side with a state sponsor of terrorism and against men and women who are seeking to recover for grievous injuries suffered in the service of our country. In any event, this Court should reject the government's sloppy analysis and its dubious bottom line. The court of appeals correctly held that, under the plain language of Section 1608(a)(3), respondents properly served petitioner. Its judgment should be affirmed.

ARGUMENT

UNDER THE FSIA, A PLAINTIFF MAY EFFECT SERVICE ON A FOREIGN STATE BY MAILING A SERVICE PACKET TO THE FOREIGN MINISTER AT THE FOREIGN STATE'S EMBASSY IN THE UNITED STATES

A. The Text Of Section 1608(a)(3) Unambiguously Permits Mailing The Service Packet To The Foreign Minister At The Foreign State's Embassy In The United States

Under 28 U.S.C. 1608(a)(3), a plaintiff may effect service by "sending" a service packet "addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." The

question in this case is whether the "addressed and dispatched" requirement is satisfied where, as here, the service packet is addressed to the foreign minister and delivered to the foreign state's embassy in the United States. The answer to that question is plainly yes, because Section 1608(a)(3) does not specify a particular location where the service packet should be sent.

1. The natural meaning of the verb "address" is "[t]o send as a written message to (some one); to write (anything) expressly that it may reach and be read by some one; to destine, inscribe, dedicate." *Oxford English Dictionary* 105 (1st ed. 1933); see *Webster's Second New International Dictionary* 30 (1959) (defining "address" as "[t]o direct, as words (to anyone or anything)," "especially * * * to some particular person or persons"); *Random House Dictionary* 17 (1973) (defining address as "[t]o direct a * * * written statement to"; "[t]o direct to the ear or attention"; "to put the directions for delivery on"). The verb "dispatch," in turn, means "[t]o send off posthaste or with expedition or promptitude." *Oxford English Dictionary* 478; see *Webster's Second New International Dictionary* 750 (defining "dispatch" as "[t]o send off or away with promptness or speed, esp. on official business"); *Random House Dictionary* 413 (defining "dispatch" as "to send off or away with speed"). Accordingly, Section 1608(a)(3) requires that a service packet be directed to the foreign minister ("addressed") and sent to him in an expeditious manner ("dispatched").

Respondents plainly complied with that requirement. The clerk of the court sent the service packet by certified mail, return receipt requested, directed to petitioner's

foreign minister.[2] And the packet was sent to the foreign minister at petitioner's embassy in the United States—which, like any other embassy, serves as a component and extension of the foreign ministry, with a direct line of reporting and communication to the foreign minister. See Ludwik Dembinski, *The Modern Law of Diplomacy* 31-32 (1988); Embassy of the Republic of Sudan in the United States, *Sudan's Foreign Policy* <tinyurl.com/sudaneseembassy> (last visited Sept. 18, 2018).

The question in this case is whether Section 1608(a)(3) contains an additional requirement that the service packet be sent to the foreign minister at the address of the foreign ministry in the foreign state. But nothing in the text of Section 1608(a)(3) supports such a requirement. The term "address" merely contemplates the identification of an addressee to whom the packet is directed, without mandating a *particular* location at which the addressee is to be reached. And the term "dispatch" requires only that the packet be sent in an expeditious manner, again without mandating a particular location where the packet should be sent.

Other textual cues are to the same effect. For example, later in Section 1608(a), the statute defines a "notice of suit" as a "notice addressed to a foreign state." The term "addressed" introduces the entity to which the notice must be directed (the "foreign state"), but it in no way

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[2] Petitioner suggests in passing (Br. 7) that the foreign minister named on the envelope had left office a few months earlier. Even assuming it were true, that assertion (which petitioner raised for the first time in its reply brief at the rehearing stage and which the court of appeals did not consider) is beside the point, because the envelope clearly identified the recipient in his official capacity as the "Minister of Foreign Affairs." Addressing the service packet to the foreign minister by title is sufficient. See *Barot* v. *Embassy of Zambia*, 785 F.3d 26, 30 (D.C. Cir. 2015).

mandates where the notice must be sent. Because "identical words used in different parts of the same statute are generally presumed to have the same meaning," it follows that "addressed" in Section 1608(a)(3) contemplates the *who* but does not specify the *where*. *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 34 (2005); see, *e.g.*, *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017).

Notably, every court to have considered the question has recognized that "the text [of Section 1608(a)(3)] does not specify a geographic location for the service of process." *Kumar* v. *Republic of Sudan*, 880 F.3d 144, 155 (4th Cir. 2018), petition for cert. pending, No. 17-1269 (filed Mar. 9, 2018). The phrase "address[] and dispatch[]" "does not meaningfully limit the geographic location where service is to be made"; at most, it "reinforce[s] that the location must be related to the intended recipient." *Ibid.*; see J.A. 178; Dkt. 176, at 28-29, *Kumar* v. *Republic of Sudan*, Civ. No. 10-171 (E.D. Va.); *Rux* v. *Republic of Sudan*, Civ. No. 04-428, 2005 WL 2086202, at *16 (E.D. Va. Aug. 26, 2005).

The plain language of Section 1608(a)(3) is dispositive. It is a rudimentary principle of statutory interpretation—in fact, a principle "so obvious that it seems absurd to recite it"—that, where a statute omits a requirement, "[t]he absent provision cannot be supplied by the courts." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 93-94 (2012) (Scalia & Garner). Instead, "a matter not covered is to be treated as not covered." *Id.* at 93. This Court has routinely refused to "add an extra clause" to the text of a statute because doing so "is not a construction of a statute, but, in effect, an enlargement of it by the court." *Nichols* v. *United States*, 136 S. Ct. 1113, 1118 (2016) (citation omitted); see, *e.g.*, *Iselin* v. *United States*, 270 U.S. 245, 251 (1926); *United*

States v. *Union Pacific Railroad*, 91 U.S. (1 Otto) 72, 85 (1875).

Adding a location requirement would "[]supplement[]" the statute in just that (impermissible) way. See Scalia & Garner 98. While Section 1608(a)(3) is punctilious as to the form of mail that must be used (one requiring a signed receipt), the identity of the sender (the clerk of the court), and the identity of the recipient (the foreign minister), the statute is silent as to the location *where* the service packet should be sent.

2. If Congress had wished to specify the location where the service packet should be sent, it could and surely would have done so explicitly: for example, by adding a phrase such as "at the ministry" or "in the foreign state's seat of government" to the end of Section 1608 (a)(3).

a. In fact, Congress did exactly that in the very next paragraph. Section 1608(a)(4), which provides for service through diplomatic channels, requires that the service packet be "addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia." That provision specifies not only the who, but also the where, for the mailing of the service packet.

The inclusion of a location in an immediately adjacent provision with a strikingly parallel construction strongly suggests that Congress acted deliberately in declining to specify a location in Section 1608(a)(3). See *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 452 (2002). As this Court explained in addressing another question under the FSIA last Term, "[h]ad Congress likewise intended [the provision] to have such an effect, it knew how to say so." *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816, 826 (2018).

b. Section 1608(a)(4) is hardly unusual in this respect. In service provisions throughout the United States Code, Congress routinely provides for materials to be addressed

to an individual at a particular location when Congress intends to require delivery at that location. See, *e.g.*, 21 U.S.C. 355(g) (providing for service by "mail addressed to the applicant or respondent at his last-known address in the records of the Secretary [of Health and Human Services]"); 28 U.S.C. 1866(b) (providing for service by "mail addressed to such person at his usual residence or business address"); 33 U.S.C. 912(c) (requiring notice "by mail addressed to [the employer] at his last known place of business"); 47 U.S.C. 325(e)(2) (directing that a complaint be sent by United States mail "addressed to the chief executive officer of the satellite carrier at its principal place of business"); cf. Fed. R. Civ. P. 4(i)(1)(B) (providing for service "by registered or certified mail to the Attorney General of the United States at Washington, D.C.").

As this Court has explained, it is "particularly inappropriate" to "[d]raw[] meaning from [Congress's] silence" when "Congress has shown that it knows how to [address an issue] in express terms" in other statutes. *Kimbrough* v. *United States*, 552 U.S. 85, 103 (2007). In Section 1608(a)(3)—unlike Section 1608(a)(4) and multiple other statutes—Congress required only that the service packet be addressed and dispatched to the foreign minister. As long as the packet is directed to the correct individual and sent in an expeditious manner, Congress was agnostic about the location where the packet is sent. The import of Congress's silence is especially clear here, and the Court should not rewrite the statute to add a limitation that Congress knew how to include but chose to omit.

3. The statutory text should be the beginning and the end of the matter here. "[W]hen [a] statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Sebelius* v. *Cloer*, 569 U.S. 369, 381 (2013) (citation omitted).

Far from being absurd, Congress's decision to leave the location of the mailing open, as long as the mailing is sent to the foreign minister in an expeditious manner, is entirely logical. Indeed, mailing a service packet to a foreign minister at the foreign state's embassy may be a particularly effective way to reach the minister—especially where, as here, mail service to the relevant country is likely to be unreliable. As the court of appeals recognized, "direct mailing relies on the capacity of the foreign postal service or a commercial carrier," whereas the embassy, as an arm of the foreign ministry, can, if it accepts service, transmit the service packet to the foreign minister "by diplomatic pouch." J.A. 182.

By contrast, requiring mailing to the foreign ministry would increase the frequency with which Section 1608(a)(3) service fails, with the accompanying delay, cost, and uncertainty for the plaintiffs whom the FSIA sought to protect. See D. Ct. Dkt. 213, at 2-5, *Kumar*, *supra* (detailing the challenges of attempted service in Khartoum, including the failure to receive return receipts within the statutory time period); 22 C.F.R. 22.1 (setting $2,275 fee for service under Section 1608(a)(4)). Further, to the extent that imposing such a judicially created requirement would result in the more frequent use of Section 1608(a)(4), which puts American diplomats in the position of serving process on foreign states, that would be an undesirable outcome from a comity perspective—likely why Congress provided for service through diplomatic channels only as a last resort. See 28 U.S.C. 1608(a).

B. Petitioner's Alternative Interpretation Is Contrary To The Plain Text Of Section 1608(a)(3)

Petitioner's arguments in support of an additional requirement that the service packet be sent to the address of the foreign ministry are unavailing.

1. a. Petitioner contends that the term "addressed" dictates the location for the service of process, arguing that the service packet "must be sent to the address of the head of the ministry of foreign affairs in the foreign state." Br. 22. As we have already explained, that is incorrect as a textual matter. The statute requires only that the packet be directed to the foreign minister and sent in an expeditious manner, not that it be sent to the foreign minister at a particular location. See pp. 19-22, *supra*. And when Congress wishes to specify the location of service, it does so expressly. See pp. 22-23, *supra*. If the mere use of the term "address" implied "send to the addressee's primary place of business," Congress would have littered the United States Code with needless surplusage. See, *e.g.*, 28 U.S.C. 1866(b); 47 U.S.C. 325(e)(2).

Petitioner does not contend that Section 1608(a)(3) unambiguously supports its interpretation. Instead, it contends only that its interpretation is the "natural reading" of the text. Br. 22. But even that contention is incorrect, and a simple example shows why. Suppose the statute expressly provided that the service packet be "addressed and dispatched to the head of the ministry of foreign affairs of the foreign state concerned at the foreign state's American embassy," or "addressed and dispatched to the Secretary of State at 1801 North Lynn Street, Arlington, VA 22209." See Department of State, *Contact Us* <tinyurl.com/clearanceaddress> (last visited Sept. 18, 2018) (listing the Arlington address for the State Department). There would be nothing unnatural about either of those provisions, precisely because nothing in the phrase "addressed and dispatched" excludes the use of those locations.

In a related vein, petitioner contends (Br. 22) that, because the service packet was sent to the foreign minister at the Sudanese embassy, he was not thereby served at

his own address. Once again, Congress did not specify in this statute (unlike in others) which address should be used. But petitioner's contention simply begs the question: after all, the district court found that the Sudanese embassy had accepted the service packet on the foreign minister's behalf. J.A. 88, 216-217. In light of that finding, petitioner cannot articulate why the embassy address was not the minister's in the sense relevant here.[3]

For its part, the government complains that nothing in Section 1608(a)(3) affirmatively suggests that "Congress expected foreign ministers to be served at locations removed from their principal place of performance of their official duties." Br. 14. But that gets the relevant inquiry exactly backwards, faulting Congress for failing to *reject* a limitation that is not contained in the statutory text. Congress did not need to specify that a notice of suit could be prepared in a typeface other than Times New Roman, even if Times New Roman is the most commonly used typeface in legal documents. So too here, if Congress had intended to impose a limitation on the location for the service of process, it would have done so in "clear language." Scalia & Garner 93 (citation omitted).

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[3] Although petitioner attempts to generate doubts about whether the embassy and the minister in fact received the service packet, see Br. 7-8, 48, the court of appeals held that those arguments, raised for the first time in petitioner's reply brief at the rehearing stage, were not properly before it. J.A. 225-226; cf. Pet. C.A. Br. 4-12. What is more, petitioner affirmatively disclaimed those arguments in its briefs at the certiorari stage, arguing that the only "relevant" facts to the question presented were "undisputed." Pet. Cert. Reply Br. 4. Finally on this point, the underlying factual finding by the District of Columbia district court that petitioner had accepted service would be reviewable, if at all, only for clear error, see, *e.g.*, *Gates* v. *Syrian Arab Republic*, 646 F.3d 1, 4 (D.C. Cir.), cert. denied, 565 U.S. 945 (2011), and petitioner points to nothing that would remotely satisfy that deferential standard here.

b. Looking beyond the terms "addressed" and "dispatched," petitioner focuses on the "signed receipt" requirement, arguing that a signed receipt "cannot verify delivery to the head of the ministry" when the service packet is sent to the embassy address. Br. 22. But the same is true when a service packet is sent to the address of the foreign ministry: the packet will ordinarily be accepted and signed for by a mailroom employee, not by the foreign minister himself. A signed receipt establishes that the foreign state has accepted the service packet on the foreign minister's behalf; it can never guarantee that delivery to the foreign minister (or to the responsible official) in fact occurs.

What is more, if timely delivery does not occur, the foreign state has protection above and beyond the requirement of strict compliance with the FSIA. Consistent with Civil Rule 55(c), a foreign state can challenge the entry of default upon a showing of good cause, and it can challenge even the subsequent entry of a default judgment by showing, *inter alia*, that its failure to respond to the complaint was not willful. See, *e.g.*, *Hilt Construction & Management Corp.* v. *Permanent Mission of Chad to United Nations*, Civ. No. 16-6421, 2017 WL 4480760, at *2-*3 (S.D.N.Y. Oct. 6, 2017) (vacating a default judgment where the service packet was sent to the foreign ministry but not opened in time to file a response).

In support of its reliance on the "signed receipt" requirement, petitioner points to Section 1608(c)(2) and (d), which together provide that a foreign state must respond to a complaint within 60 days of the date on the signed receipt. If Congress had intended to permit mailing to the embassy, petitioner contends, it "likely" would have used the date of delivery as the trigger for the 60-day period (or otherwise provided for "extra time"). Br. 23. That is

incorrect. Indeed, under the regulations governing service under Section 1608(a)(4), when the Secretary of State delivers a service packet to an embassy, it uses the date of that delivery (rather than the ultimate receipt by the foreign ministry) as the relevant trigger. See 22 C.F.R. 93.1(e).

In any event, notifying the foreign minister of the suit and conveying the service packet need not take any significant time: an embassy can transmit the materials expeditiously using a diplomatic pouch, secure fax, or secure e-mail, just as it would for any other time-sensitive business. See Anthony Aust, *Handbook of International Law* 122 (2d ed. 2010). If transmission is delayed, the foreign state can challenge an ensuing default upon a showing of good cause. See p. 27, *supra*. And an embassy that believes it would be time-consuming or inconvenient to transmit the materials to the foreign minister can decline to sign a receipt for a package addressed to the minister, causing service under Section 1608(a)(3) to fail (an option it does not have for service under Section 1608(a)(4)). See pp. 33-34, *infra*.

2. Unable to support the proposition that Section 1608(a)(3) itself requires that the service packet be sent to the address of the foreign ministry, petitioner attempts to back into such a requirement through Section 1608(b), which governs service on an agency or instrumentality of a foreign state. See Br. 23-24. That effort is unavailing.

Section 1608(b)(2), the counterpart to Section 1608 (a)(2) for service under an international convention, provides for service by "delivery" of the service packet to "an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States." 28 U.S.C. 1608(b)(2). Like Section 1608(a)(3), Section 1608(b)(2) specifies only the person who must be the ultimate recipient of the packet.

In the case of Section 1608(a)(3), the packet must be sent to the foreign minister; in the case of Section 1608(b)(2), it must be delivered to an officer or agent of the agency or instrumentality. Neither provision prescribes the location where the packet must be addressed.

Petitioner suggests (Br. 24) that, without an implicit location requirement, Section 1608(a)(3) would effectively grant permission to send the service packet to an agent in lieu of the foreign minister. Not so. Section 1608(a)(3) requires that the service packet must be addressed and dispatched *to the foreign minister*; no substitution is permitted. Petitioner cannot seriously be arguing that process is successful only if the service packet is delivered to the addressee without the use of intermediaries: whether served at the embassy or the foreign ministry, the packet will ordinarily be accepted, and the receipt signed, by a mailroom employee. There is no reason that the involvement of an intermediary takes the transmission outside the statutory language as long as the "addressed and dispatched" requirement is met.

Petitioner further notes that Section 1608(b)(3) provides for service "if reasonably calculated to give actual notice." Br. 23. But no inference about Section 1608(a)(3) can be drawn from the inclusion of that language in Section 1608(b)(3); it constitutes an additional overarching requirement, applicable not just to service by mail but also service by other means (*e.g.*, "by order of the court"). 28 U.S.C. 1608(b)(3). While Section 1608(a)(3) does not contain that discrete requirement, it does require that the service packet be "dispatched" to the foreign minister: that is, that it be sent in a manner likely to reach the foreign minister promptly. See p. 34, *infra*.

3. Recognizing the problem it presents for its interpretation, petitioner attempts to explain away the inclu-

sion of a location for service in Section 1608(a)(4)—language that, under its interpretation, would otherwise be superfluous. Petitioner contends that the reference in that provision to the Secretary of State "in Washington, District of Columbia" was included in order to distinguish the United States Secretary of State from "a Secretary of State of an individual state." Br. 28. But that is no answer to the critical point that Congress knew how to include a location for service when it chose to do so (for whatever purpose). See pp. 22-23, *supra*.

Petitioner seemingly embraces that principle, acknowledging that "drawing inferences from silence is unwarranted when Congress expressly addressed [an] issue elsewhere in the FSIA." Br. 27. But petitioner proceeds to do just that, arguing that the inclusion of the Washington location in Section 1608(a)(4) "confirms that a [Section] 1608(a)(3) mailing, too, must be sent to the relevant capital city." Br. 28. That is exactly the wrong inference: Congress's silence in Section 1608(a)(3) on the very issue it addressed in Section 1608(a)(4) powerfully indicates that the two provisions should be read differently, not identically. See p. 22, *supra*.

In any event, petitioner's proffered explanation for Section 1608(a)(4) is implausible on its own terms. There can be no serious doubt that, in a statute about foreign relations, "*the* Secretary of State" in Section 1608(a)(4) (not to mention one associated with a "Director of Special Consular Services" and able to transmit materials through diplomatic channels), refers to the United States Secretary of State. 28 U.S.C. 1608(a)(4) (emphasis added). Nor does the location clause avoid any purported confusion, because the District of Columbia has a Secretary of State of its own. See District of Columbia, Office of the Secretary <tinyurl.com/dcsecretary> (last visited

Sept. 18, 2018). It is therefore clear that Congress's purpose in including a location for service was precisely what the plain language suggests: to specify where the Secretary should be served.[4]

4. Petitioner contends (Br. 25-26) that numerous courts of appeals have embraced its reading of Section 1608(a)(3). Petitioner greatly overstates its case. The vast majority of those decisions did not address the question presented, but instead rejected service that was plainly impermissible under Section 1608(a)(3). See *Barot* v. *Embassy of Zambia*, 785 F.3d 26, 28-29 (D.C. Cir. 2015) (service packet sent to the Zambian foreign ministry but addressed to the embassy of Zambia rather than the foreign minister); *Magness* v. *Russian Federation*, 247 F.3d 609, 613 (5th Cir.) (service materials sent to the Texas Secretary of State for forwarding to the foreign president and sent directly to the deputy culture minister in the foreign state's capital), cert. denied, 534 U.S. 892 (2001); *Transaero, Inc.* v. *La Fuerza Aerea Boliviana*, 30 F.3d 148, 153 (D.C. Cir. 1994) (service packets sent to the foreign state's ambassador, consul general, and first minister), cert. denied, 513 U.S. 1150 (1995); *Alberti* v. *Empresa Nicaraguense de La Carne*, 705 F.2d 250, 252-253 (7th Cir. 1983) (service packet addressed to the foreign state's ambassador rather than its foreign minister); *Autotech Technologies LP* v. *Integral Research & Development Corp.*, 499 F.3d 737, 748 (7th Cir. 2007) (service attempted

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[4] The government offers a different explanation for Section 1608(a)(4), arguing that it would be difficult to formulate a corresponding clause for Section 1608(a)(3) because it would have to address "locations in many countries." Br. 17. Not so: Congress could simply have added "at the ministry" or "in the foreign state's seat of government" to the end of Section 1608(a)(3). See p. 22, *supra*.

on the foreign state's ambassador), cert. denied, 552 U.S. 1231 (2008).[5]

To be sure, some of those decisions paraphrased Section 1608(a)(3) as requiring service to be directed to the foreign ministry. For example, the District of Columbia Circuit stated that "[S]ection 1608(a) mandates service of the Ministry of Foreign Affairs." *Transaero*, 30 F.3d at 154. But such loose descriptions in decisions that do not address the question presented signify little. Tellingly, in a subsequent case, the D.C. Circuit had no qualms in rejecting service where the packet was sent to a ministry of foreign affairs but not addressed to the foreign minister. See *Barot*, 785 F.3d at 28-29.

In fact, the Fourth Circuit's decision in *Kumar* is the sole decision to adopt petitioner's interpretation of Section 1608(a)(3), and even it did not do so based on the plain language of the provision. See 880 F.3d at 155. Instead, it concluded that, while "not strictly prohibited by the statutory language," the service at issue was impermissible because it was "in tension with Congress's objective" and inconsistent with the United States' obligations under the Vienna Convention. *Ibid.* The Fourth Circuit's reasoning was wrong on its own terms. See pp. 35-49, *infra*. But for present purposes, the key point is that the Fourth Circuit's decision provides no support for the textual arguments advanced by petitioner.

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[5] Oddly, the government also relies on *Gates*, *supra*, for the proposition that Syria did not dispute the propriety of service of process under Section 1608(a)(3) when the service packet was "address[ed] to the Syrian Ministry of Foreign Affairs." Br. 14. But the packet in that case was addressed to the "Minister of Foreign Affairs" at the Ministry of Foreign Affairs, thereby indisputably satisfying Section 1608(a)(3). See Dkt. 6-1, *Gates* v. *Syrian Arab Republic*, No. 06-1500 (D.D.C.).

5. Petitioner makes a series of policy arguments in support of its interpretation and against the plain-text interpretation. All of those arguments lack merit.

a. Petitioner contends (Br. 45-47) that permitting the service packet to be mailed to the foreign minister at the foreign state's embassy would place an improper burden on the embassy. But the embassy—which is not itself the addressee—incurs no obligations as to the service packet simply because it is delivered to the embassy's address. If a foreign state does not wish to use its diplomatic pouch (or other means) to transmit a service packet to the foreign minister, it need not do so. The foreign state can decline to sign for a package from a clerk of court addressed to the foreign minister, just as it presumably would for any package addressed to an individual with which the embassy lacks a direct line of communication (such as a private citizen). For that matter, the foreign state can refuse to sign for such a package even if the service packet is mailed to the foreign minister at the foreign ministry, and even if it does so precisely in order to avoid service. If the foreign state does not sign, service under Section 1608(a)(3) will fail, and a plaintiff will have to seek to effect service through diplomatic channels under Section 1608(a)(4) instead.[6]

Indeed, that appears to be what petitioner did in *Kumar* when it was re-served at the foreign ministry in Khartoum in precisely the manner it requests here: petitioner did not sign the return receipts, with the result that service was not perfected under Section 1608(a)(3). See

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[6] For similar reasons, embassy personnel are not functioning as "de facto agents" for service of process, as petitioner and the government suggest (Pet. Br. 42; U.S. Br. 27). Absent the embassy's agreement to transmit the materials to the foreign minister as an addressee that can be found at its address, service at that address is not effective. See 28 U.S.C. 1608(c)(2).

D. Ct. Dkt. 213, at 3 n.2, *Kumar*, *supra*. While petitioner was within its rights to do so, its refusal to accept service utterly belies its claim that it is seeking "an opportunity to defend itself" on the merits, Br. 6, and confirms that it is instead seeking to delay relief for the *Cole* victims through any available means.

By contrast, in this case, the clerk certified that petitioner had signed for the service packet, thereby implicitly agreeing to transmit the packet to the addressee. See p. 9, *supra*. Petitioner did not contend that its action in signing for the packet was an oversight, nor did it seek to rescind its signature by returning the packet or otherwise indicating that it did not wish to accept service. Instead, it allowed the litigation to proceed for years, challenging service only after judgment had been entered and the turnover orders had been issued. Under those circumstances, it is dimly ironic for petitioner to cite the burden on embassies as a justification for rejecting the plain-text interpretation of Section 1608(a)(3).

b. Petitioner further contends (Br. 30) that, without its proposed location requirement, a service packet could be mailed to other offices of the foreign state, such as a tourism office. But petitioner disregards the limitation embodied in the text of Section 1608(a)(3) itself: that the service packet must be "dispatched" to the foreign minister, *i.e.*, sent in a manner likely to reach the foreign minister promptly. To satisfy that limitation, the service packet would have to be sent to a location that is likely to have a direct line of communication to the foreign minister. The foreign ministry and an embassy plainly would qualify; a tourism office plainly would not.

c. Finally, petitioner emphasizes that Section 1608(a)(3) must be followed "meticulously and without de[vi]ation." Br. 24. True enough, but that is all the more

reason to read the statute by its terms, not to add a requirement the statute does not expressly contain. It would be grossly unfair to hold plaintiffs to rigid compliance with a requirement that is not evident on the face of the statute.

This case amply illustrates the point. Respondents, victims of a horrific terrorist attack and their spouses, followed Section 1608(a)(3) to the letter in serving petitioner—at a time when Sudan was wracked with conflict and the ability to effect service directly in Sudan was at best uncertain. No court, much less this one, had then held that Section 1608(a)(3) contained the unstated requirement that the service packet be sent to the address of the foreign ministry. After respondents sent the service packet to the foreign minister at the Sudanese embassy, the embassy accepted service. Respondents established their entitlement to relief more than six years ago, and, after additional proceedings, obtained turnover orders giving them access to some of petitioner's assets. It would be the height of unfairness to throw out respondents' judgment now, forcing them to start from square one, simply because they failed to intuit and then comply with an additional, unstated requirement.

C. The Plain-Text Interpretation Of Section 1608(a)(3) Is Consistent With The Vienna Convention On Diplomatic Relations

Acknowledging that the text of Section 1608(a)(3) is at most ambiguous as to their asserted location requirement, petitioner and the government heavily rely on the Vienna Convention on Diplomatic Relations to support their proposed interpretation. See Pet. Br. 31-49; U.S. Br. 20-29. Because Section 1608(a)(3) is unambiguous, the Court need not consider the Vienna Convention at all. In any event, an interpretation of Section 1608(a)(3) that permits the mailing of a service packet to a foreign minister at the

foreign state's embassy is entirely consistent with the Convention. As both the commission that drafted the Vienna Convention and the Supreme Court of the United Kingdom have recognized, the Convention does not place any limit on the service of process by mail. Petitioner's and the government's contrary arguments are riddled with errors.

1. At the outset, petitioner and the government argue (Pet. Br. 33-34; U.S. Br. 21) that Section 1608(a)(3) must be interpreted consistently with the Vienna Convention under the canon of construction that statutes should not be interpreted to conflict with treaties. That is itself incorrect. Properly understood, that canon applies only to ambiguous statutes. See, *e.g.*, *Whitney* v. *Robertson*, 124 U.S. 190, 194-195 (1888); *Fund for Animals, Inc.* v. *Kempthorne*, 472 F.3d 872, 879 (D.C. Cir. 2006). Because the text of Section 1608(a)(3) is unambiguous, see pp. 18-24, *supra*, the canon "give[s] way" and has no application here. *Cloer*, 569 U.S. at 381. If Section 1608(a)(3) were inconsistent with the Convention (and it is not), the later-in-time statute would "render[] the treaty null." *Breard* v. *Greene*, 523 U.S. 371, 376 (1998) (per curiam) (citation omitted).

Petitioner, but not the government, suggests (Br. 34-35) that the FSIA incorporates the requirements of the Vienna Convention because one of its provisions states that it is "[s]ubject to existing international agreements." 28 U.S.C. 1604. But the cited provision addresses only subject-matter jurisdiction; nothing in that provision suggests that the *rest* of the FSIA is "[s]ubject to existing international agreements." In fact, that clause also appears in Section 1609 (governing immunity from attachment of property), but it conspicuously does not appear in the provision at issue here, Section 1608. The inclusion of that clause in Sections 1604 and 1609 strongly suggests that its

omission in Section 1608 was intentional. See, *e.g.*, *Sigmon Coal*, 534 U.S. at 452.[7]

2. In any event, the plain-text interpretation of Section 1608(a)(3) is entirely consistent with the Vienna Convention. Petitioner and the government contend that the mailing of a service packet to a foreign minister at the foreign state's embassy violates Article 22, Section 1, of the Vienna Convention. They further assert that the drafting history, interpretation by other signatory nations, prevailing understanding among commentators, and longstanding Executive Branch interpretation all support that view. Petitioner and the government are wrong in every respect. The Convention does not limit service of process by mail.

a. The starting point in interpreting the Vienna Convention is its text. See *Water Splash, Inc.* v. *Menon*, 137 S. Ct. 1504, 1508 (2017). Nothing in the Convention's text speaks to the service of process or otherwise suggests that mailing a service packet to an embassy is prohibited.

In full, Article 22, Section 1, of the Vienna Convention reads as follows: "The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission." Article 22, Section 1, thus links the inviolability of diplomatic premises with protection from physical intrusion by agents of the receiving state. But no such intrusion by a state agent occurs when a service packet (or any other document) is delivered through the mail. See 7 Marjorie M. Whiteman, *Digest of International Law* § 36, at 376 (1970) (Whiteman) (quoting an official State Depart-

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[7] In fact, in an earlier version of the bill, Congress included "[s]ubject to existing and future international agreements" in Section 1608, but it removed the phrase before the FSIA was enacted. H.R. 11315, 94th Cong. 48 (1975).

ment statement that, under Article 22, no "specific invitation" is required "for the milkman, the postman, [or] the garbage man").

That interpretation accords with both the plain language and common sense. Mailing is not an act of trespass. As one court has explained, "[a]s a matter of ordinary language, it is difficult to see why posting documents" to diplomatic premises "by way of service of proceedings * * * infringes the inviolability" of those premises, because it "certainly does not involve entry into the [premises] by agents of the receiving [s]tate." *Reyes* v. *Al-Malki*, [2015] EWCA (Civ) 32 [86] (Lord Dyson, Master of the Rolls), aff'd, [2017] UKSC 61. Put differently, "[t]he inviolability of the foreign missions does not bar them from receiving tons of mail through the national postal services every day." Rolf Einar Fife & Kristian Jervell, *Elements of Nordic Practice 2000: Norway*, 70 Nordic J. Int'l L. 531, 553 (2001) (Fife & Jervell). If it were otherwise and service of process by mail at a foreign embassy were impermissible, it is hard to see why service of process by mail at a foreign ministry would be permissible either.

Nor does the delivery of service documents impermissibly interfere with the embassy staff's performance of their duties, as petitioner suggests (Br. 36). See *Reyes* v. *Al Malki*, [2017] UKSC 61 [16]; *Renchard* v. *Humphreys & Harding, Inc.*, 59 F.R.D. 530, 532 (D.D.C. 1973). That is particularly true under Section 1608(a)(3), because the delivery of a service packet by mail has no effect unless and until the embassy chooses to sign for it and thereby undertakes the (modest) obligation of transmitting it to the foreign minister.

b. While the interpretation of a treaty begins with the text, this Court has considered the drafting history as an "aid[] to its interpretation." *Medellin* v. *Texas*, 552 U.S.

491, 506-507 (2008) (citation omitted). Petitioner and the government urge the Court to do the same here. See Pet. Br. 38-39; U.S. Br. 23. Incredibly, however, both petitioner and the government primarily rely on an obsolete and superseded report. The Convention's full drafting history confirms what its plain language indicates: Article 22 does not prohibit mailing a service packet to an embassy.

The articles that became the Convention were drafted by members of the United Nations' International Law Commission (ILC). Petitioner and the government rely on the ILC's 1957 report, adopted at its ninth session, which contained draft articles and corresponding commentary. See Pet. Br. 38-39; U.S. Br. 23. In particular, petitioner and the government quote language in the 1957 commentary stating that, under proposed Article 22 (then numbered Article 16), "no writ shall be served within the premises of the mission." Pet. Br. 38; U.S. Br. 23 (quoting *Report of the International Law Commission Covering the Work of Its Ninth Session, 23 April-28 June 1957*, 12 U.N. GAOR Supp. No. 9, at 6, U.N. Doc. A/3623 (1957), reprinted in [1957] 2 Y.B. Int'l L. Comm'n 131, 137, U.N. Doc. A/CN.4/SER.A/1957/Add.1 (*ILC Ninth Session Report*)). Petitioner also emphasizes the statement in the 1957 commentary that all writs constituting service of process "must be delivered *through the Ministry for Foreign Affairs of the receiving [s]tate.*" Br. 39 (quoting *ILC Ninth Session Report* 137).[8]

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[8] In emphasizing that language, petitioner appears to confuse the foreign ministry of the "receiving [s]tate" (which, in the parlance of the Vienna Convention, is the state that "receives" the diplomatic mission, here the United States) with the foreign ministry of the sending state (which is the state that is subject to service). See Br. 39. If Article 22 required all service to be delivered through the United

However, the ILC's work did not end in 1957. At its tenth session, in 1958, the ILC adopted the final set of draft articles that ultimately became the Vienna Convention. See G.A. Res. 1450 (XIV) (Dec. 7, 1959). Like the 1957 commentary, the 1958 commentary acknowledged that "no writ may be served within the premises of the mission" under proposed Article 22 (then renumbered Article 20). *Report of the International Law Commission Covering the Work of Its Tenth Session, 28 April-4 July 1958*, 13 U.N. GAOR Supp. No. 9, at 17, U.N. Doc. A/3859 (1958), reprinted in [1958] 2 Y.B. Int'l L. Comm'n 78, 95, U.N. Doc. A/CN.4/SER.A/1958/Add.1 (*ILC Tenth Session Report*). But the revised commentary deleted the statement that certain judicial writs "must be delivered through the Ministry for Foreign Affairs of the receiving [s]tate." Compare *ILC Ninth Session Report* 137 with *ILC Tenth Session Report* 95. Critically for present purposes, the revised commentary also clarified that *"[t]here is nothing [in proposed Article 22] to prevent service through the post if it can be effected in that way." ILC Tenth Session Report* 95 (emphasis added).

The ILC's reporter, Sir Gerald Fitzmaurice, later explained that the 1957 commentary was clarified because "[t]here was in fact no reason why judicial notices should not be sent through the post." *Summary Records of the Tenth Session of the International Law Commission*, [1958] 1 Y.B. Int'l L. Comm'n 131, U.N. Doc. A/CN.4/SER.A/1958 (*Tenth Session Summary Records*). In fact, that had been the prevailing understanding of the drafters at the ninth session itself. See *ibid.*; Eileen Denza, *Diplomatic Law* 124 (4th ed. 2016) (Denza). The purpose of the statement in the 1957 commentary was simply to

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States Department of State, petitioner's own interpretation of Section 1608(a)(3) would also be inconsistent with the Vienna Convention.

"state that certain types of writ"—those that required personal service to be effective—"could not be served on mission premises." *Tenth Session Summary Records* 131 (statement of Mr. Fitzmaurice).

Remarkably, petitioner and the government seem either to be unaware of the relevant section of the final 1958 commentary or, even worse, to ignore it entirely.[9] But regardless of the explanation, their reliance on the obsolete and superseded 1957 commentary is patently improper.

Beyond the 1957 commentary, petitioner, but not the government, relies on a one-off comment attributed to a member of the Japanese delegation to the United Nations Conference on Diplomatic Intercourse and Immunities (Vienna Conference), where the draft articles that became the Vienna Convention were debated in 1961. See Br. 39. At that conference, the Japanese delegation introduced and then withdrew an amendment prohibiting writs "served *by a process server* within the premises of the mission," in order to make clear that service by post (unlike service by process server) was *permissible*. U.N. Conference on Diplomatic Intercourse and Immunities, *Annexes, Final Act, Vienna Convention on Diplomatic Relations, Optional Protocols, Resolutions*, U.N. Doc. A/CONF.20/14/Add.1, at 22 (Vol. II) (1962) (emphasis added). In withdrawing the amendment, the Japanese representative apparently expressed his belief that "it was the unanimous interpretation of the [Committee of the Whole] that no writ could be served, even by post, within the premises of a diplomatic mission." United Na-

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[9] Petitioner appears to have been aware at least of the existence of the 1958 commentary, because it cites it elsewhere in its brief for an unrelated proposition. See Br. 46. Because petitioner filed its brief before the government's, the government was on notice of the existence of the 1958 commentary.

tions Conference on Diplomatic Intercourse and Immunities, *Summary Records of Plenary Meetings and Meetings of the Committee of the Whole* 141, U.N. Doc. A.CONF.20/14 (Vol. I) (1962) (*U.N. Conference Summary Records*).

That statement warrants little weight, because it has no support in the underlying conference records. As a member of the American delegation who attended the conference explained shortly after its conclusion, "[w]hether or not there was in fact * * * a consensus, the [c]onference records do not reflect it." Ernest L. Kerley, *Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities*, 56 Am. J. Int'l L. 88, 102 (1962). In fact, conference records affirmatively suggest that there was no consensus against service by post; if anything, they suggest a near-consensus in the opposite direction. See, *e.g.*, *U.N. Conference Summary Records* 137-140 (statements of Soviet, Norwegian, Spanish, Ghanaian, and Turkish representatives indicating support of service by post on diplomatic premises, with only Argentinian representative expressing opposition). Accordingly, after canvassing the conference records, at least one court has discounted the Japanese representative's statement, noting that "little attention was paid to the Japanese proposal or the basis on which it was withdrawn." *Reyes*, [2015] EWCA (Civ) 32 [90].

In any event, the Japanese representative's statement makes little sense even on its own terms. The statement was inconsistent both with Japan's proposed amendment (which, again, sought to *allow* service by mail) and with another Japanese representative's earlier statement that Japan's standard service procedure was to "notify diplomatic agents through the post" and that disallowing service by mail would put Japan "in some difficulty." *Tenth*

Session Summary Records 131 (statement of Mr. Yokota). Given those inconsistences and the absence of support in the conference records, the isolated statement of the Japanese representative cannot overcome the ILC's final commentary, which makes clear that the drafters of the Convention considered whether Article 22 prohibited service of process by mail and concluded that it did not. See *Reyes*, [2015] EWCA (Civ) 32 [89-91], [94] (reaching the same conclusion).

c. Compounding their omission of the key drafting history, petitioner and the government seem either to be unaware of, or to ignore entirely, a recent decision of the Supreme Court of the United Kingdom that addresses the question whether the Vienna Convention prohibits the service of process by mail at diplomatic premises. See *Reyes* v. *Al Malki*, [2017] UKSC 61. That decision—the only one we have found on the question from a court of last resort of a signatory nation[10]—holds that the Vienna Convention does *not* prohibit the service of process by mail, even when a default judgment may result from the failure to respond. See *id.* at [16]. As a "[d]ecision[] of the court[] of [an]other Convention signator[y]," *El Al Israel Airlines Ltd.* v. *Tsui Yuan Tseng*, 525 U.S. 155, 175 (1999), that decision is entitled to "considerable weight," *Air France* v. *Saks*, 470 U.S. 392, 404 (1985) (citation omitted).

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[10] The decisions of other courts of signatory nations cited by amici law professors (Br. 11-12), only one of which was from a court of last resort, either involved personal service on a mission, see *Sebina* v. *South African High Commission*, [2010] 3 BLR 723 IC (Botswana Indus. Ct.); *Village Holdings Sdn. Bhd.* v. *Her Majesty the Queen in Right of Canada*, [1988] 2 MLJ 656 (Malaysia H.C.); did not address the Vienna Convention at all, see *Kuwait Airways Corp.* v. *Iraqi Airways Co.*, [1995] 1 WLR 1147 (U.K. H.L.); or mentioned the Convention only in dicta, see *Sistem Mühendislik Insaat Sanayi Ve Ticaret Anomic Sirketi* v. *Kyrgyz Republic*, 2015 ONCA 447 (Can. Ont. C.A.).

In *Reyes*, a Philippine national sued her employer, a Saudi diplomat, and served process on him by mail at his residence. [2017] UKSC 61 [1]. One question in the case was whether that mode of service impinged upon the inviolability of the diplomatic residence (which, under Article 30 of the Vienna Convention, "enjoy[s] the same inviolability and protection as the premises of the mission" under Article 22). *Id.* at [8], [13], [16] (citation omitted); see *Reyes*, [2015] EWCA (Civ) 32 [86].

The Supreme Court of the United Kingdom held that the Vienna Convention did not prohibit the service of process by mail at diplomatic premises. Writing for a unanimous court on the service question, Lord Sumption concluded:

> Premises are violated [within the meaning of the Vienna Convention] if an agent of the state enters them without consent or impedes access to or from the premises or normal use of them * * *. The delivery by post of a claim form does not do any of these things. It simply serves to give notice to the defendant that proceedings have been brought against him, so that he can defend his interests, for example by raising his immunity if he has any.

Reyes, [2017] UKSC 61 [16]. Expanding on that conclusion, Lord Sumption explained:

> The mere conveying of information, however unwelcome, by post to the defendant, is not a violation of the premises to which the letter is delivered. It is not a trespass. It does not affront his dignity or affect his right to enter or leave or use [the premises]. It does of course start time running for subsequent procedural steps and may lead to a default if no action is taken. But so far as this is objectionable, it can only

> be because there is a relevant immunity from jurisdiction. It is not because the proceedings were brought to the diplomatic agent's attention by post.

Ibid. That reasoning applies with full force here. To the extent the interpretation of the Vienna Convention by other signatory nations is relevant, the decision of this Court's sister court in the United Kingdom is surely the most significant data point.[11]

d. Just as petitioner and the government omit the key drafting history and the key decisional authority, they disregard entire swaths of academic commentary on the Vienna Convention. While it is true that some commentators share petitioner's view (albeit based on superficial analysis), many other commentators, including most contemporaneous ones, have understood Article 22 not to preclude the service of process by mail. See, *e.g.*, Fife & Jervell 553; Ferdinand Mesch, *Jurisdictional Immunities of Foreign States*, 23 DePaul L. Rev. 1225, 1240 (1974); Richard Crawford Pugh & Joseph McLaughlin, *Jurisdictional Immunities of Foreign States*, 41 N.Y.U. L. Rev. 25, 31-32 (1966). In particular, two former State Department attorneys have taken the position that "[n]othing in the Vienna Convention or in customary international law prevents the use of the mail to notify a foreign state that it is required to answer a summons and complaint." Andreas F. Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U. L. Rev. 901, 934 (1969); see William L.

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[11] Petitioner relies on the views of Austria, Libya, Saudi Arabia, and the United Arab Emirates. See Br. 46-47. The positions of that select group of nations are hardly surprising, because each faces the threat of significant litigation in the United States for involvement either in the Holocaust or in more recent acts of terrorism. See, *e.g.*, *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004); *In re Terrorist Attacks on September 11, 2001*, MDL No. 03-1570 (S.D.N.Y.).

Griffin, *Adjective Law and Practice in Suits Against Foreign Governments*, 36 Temp. L.Q. 1, 13 (1962).

The "leading treatise" on which petitioner and the government rely (U.S. Br. 22; see Pet. Br. 37-38) observes that, despite the ILC's "original understanding," the view the Vienna Convention prohibits service of process by mail at diplomatic premises "seems to have become generally accepted *in practice*"; even as to that limited conclusion, however, it acknowledges that any consensus that "appeared to be emerging" no longer exists in light of the intermediate court's decision in *Reyes*. Denza 124, 126 (emphasis added). What is more, both that treatise and all of the other commentary on which petitioner and the government rely predate the decision of the United Kingdom Supreme Court in *Reyes*, which affirmed the intermediate court and unequivocally held that the Vienna Convention does not prohibit service of process by mail at diplomatic premises. The more considered academic commentary supports that position, not petitioner's.

e. Finally with regard to the Vienna Convention, petitioner and the government contend that the government's interpretation of the Vienna Convention is entitled to "great weight." Pet. Br. 13, 42, 55; U.S. Br. 22, 24. On that, too, they are mistaken.

i. As a preliminary matter, it bears remembering that the question presented here ultimately involves the interpretation of a federal statute, the FSIA—a question on which the government is not entitled to deference. This is not a case, like the cases cited by petitioner and the government, in which the question presented itself involves the interpretation of a treaty. See, *e.g.*, *Water Splash*, 137 S. Ct. at 1509; *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 180 (1982); *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961). Nor is this a case involving the

interpretation of an implementing statute that incorporates or mirrors the terms of a treaty. See, *e.g.*, *Abbott* v. *Abbott*, 560 U.S. 1, 9, 15 (2010) (affording deference in a case involving a statute that required a court to "decide the case in accordance with [the underlying treaty]" (citation omitted)); but see *Bond* v. *United States*, 134 S. Ct. 2077, 2087-2088, 2091-2092 (2014) (affording no deference).

Here, the parties are relying on the Vienna Convention only indirectly, to support their competing interpretations of the FSIA—a context in which this Court has previously refused to afford deference. See *Permanent Mission of India to United Nations* v. *City of New York*, 551 U.S. 193, 201-202 (2007). That makes good sense, because the ultimate question here is how (if at all) to reconcile the FSIA with the Vienna Convention. Cf. *Epic Systems Corp.* v. *Lewis*, 138 S. Ct. 1612, 1629 (2018) (refusing to defer to an agency interpretation in a case in which the agency "has sought to interpret [a] statute in a way that limits the work of a second statute," on the ground that "the reconciliation of distinct statutory regimes is a matter for the courts" (internal quotation marks and citation omitted)).

ii. Even if the government were entitled to deference in this context, it would be unwarranted here. The government's interpretation of the Vienna Convention would carry weight only insofar as it furthers the Court's understanding of the Convention's meaning. See *BG Group, PLC* v. *Republic of Argentina*, 572 U.S. 25, 37-38 (2014); *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 630 (2006). The government's interpretation here does not do so.

The government contends that it has "consistently adhered" to the view that Article 22 precludes the service of process by mail. Br. 21-22. That is wrong. The State Department appears to have first taken that position in 1974,

stating that the view that Article 22 precludes the service of process by mail had "come to [its] attention" and, in support of that view, relying on the ILC conference records reflecting the statement of the Japanese representative. See Department of State, *Service of Legal Process by Mail on Foreign Governments in the United States*, 71 Dep't St. Bull., No. 1840, at 459 (Sept. 30, 1974) (citing *U.N. Conference Summary Records* 141).

Before 1974, however, the State Department's view was just the opposite. In 1973, in a section-by-section analysis of the draft bill that later became the FSIA, the State Department stated that "it was generally accepted during the drafting of the Vienna Convention on Diplomatic Relations that this prohibition [on personal service of process on an ambassador] does not apply to service effected by mail." 122 Cong. Rec. 2120; see Whiteman 375 (quoting, in a 1970 State Department publication, the ILC Tenth Session Report that "[t]here is nothing to prevent service through the post if it can be effected in that way" (citation omitted)); cf. Denza 124 (suggesting that, before the 1970s, "[t]he United States had consistently favoured permitting service by post"). Given that view, it is hard to credit government's contrary, *post hoc* view, absent a more compelling explanation for the government's change of heart. See *The Diamond Rings*, 183 U.S. 176, 180 (1901).[12]

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[12] The government also points to a 1964 letter. Br. 21-22. But the passage the government cites does not address either Article 22 or service by mail, instead explaining the State Department's view that American diplomatic officers should not be required to serve summonses on foreign embassies. See Letter from Leonard C. Meeker, Acting Legal Adviser, Department of State, to John W. Douglas, Assistant Attorney General, Department of Justice 9 (Aug. 10, 1964). As to Article 22, the letter states only that transmitting a summons should not occur "by *personal* service within the premises of the embassy of the sending state." *Ibid.* (emphasis added).

In addition, the government's current position is seemingly inconsistent with its own regulations. The implementing regulation for 28 U.S.C. 1608(a)(4), which directs the Secretary of State to transmit the service documents to the foreign state through diplomatic channels, expressly allows for delivery *to a foreign state's embassy* in the United States. See 22 C.F.R. 93.1(c)(2) (authorizing such delivery "[i]f the foreign state so requests or if otherwise appropriate"). If service of process by mail at the embassy were a violation of Article 22, that approach, which involves a delivery directly to the embassy under cover of a diplomatic note, presumably would be too.

In light of the inconsistency in the government's positions and the apparent inconsistency with its own regulations, the government's current position is entitled to little weight. See *Perkins* v. *Elg*, 307 U.S. 325, 328, 337-342 (1939). And that is particularly true because the government's current position is based on a systematic misunderstanding of the drafting history and other sources interpreting the Vienna Convention. See pp. 38-46, *supra*. Respondents' interpretation, by contrast, is supported by the ILC itself, nearly every ILC representative to have addressed the issue, most contemporaneous commentators, and the Supreme Court of the United Kingdom. See *ibid.* Even if the text of Section 1608(a)(3) were ambiguous—and it is not—respondents' interpretation of that provision is entirely consistent with the Convention.

D. The Plain-Text Interpretation of Section 1608(a)(3) Is Consistent With The Legislative History

Petitioner and the government also rely on the legislative history of the FSIA. See Pet. Br. 49-54; U.S. Br. 29-32. Because the plain text of Section 1608(a)(3) resolves the question presented, "that is * * * where the inquiry should end." *Puerto Rico* v. *Franklin California Tax-*

Free Trust, 136 S. Ct. 1938, 1946 (2016) (internal quotation marks and citation omitted). To the extent the Court wishes to consider it, however, the legislative history sheds little light on the question in this case.

Petitioner and the government cite the House Judiciary Committee's report, which suggests that "[s]ervice on an embassy by mail [is] precluded under this bill" in order to "avoid questions of inconsistency with [Article 22(1)] of the Vienna Convention." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 26 (1976). But it is clear from context that the report was addressing the discrete issue of service directed to an *ambassador*: specifically, a mailing that would make the ambassador, not the foreign minister, the ultimate recipient of service. The version of the FSIA as introduced in 1973 permitted sending a service packet "to be addressed and dispatched * * * *to the ambassador or chief of mission* of the foreign state"; it did not mention embassies at all. S. 566, 93d Cong. (1973) (emphasis added); H.R. Rep. No. 1487, *supra*, at 26.

In enacting the FSIA in 1976, Congress reworked that provision, replacing the ambassador with the foreign minister. 28 U.S.C. 1608(a)(3). Thus, when the House Report refers to service "on an embassy" being prohibited under the 1976 bill (as contrasted with the earlier 1973 bill), it was seemingly referring to mailings sent *to ambassadors*, not mailings sent to others at embassies. Cf. *Hellenic Lines, Ltd.* v. *Moore*, 345 F.2d 978, 983 & n.5 (D.C. Cir. 1965) (Washington, J., concurring) (recognizing that service on an ambassador by mail avoids some of the problems inherent in personal service, but noting other problems with mail addressed to the ambassador).

Always the best indicator of congressional intent, the statutory text makes clear that Congress did not do what petitioner and the government say it supposedly in-

tended: prohibit the service of process by mail at an embassy. The text of Section 1608(a)(3) contains no limitation on the location for the service of process, and the legislative history cannot (and does not) supply such a limitation.

E. The Government Has No Legitimate Interest In The Adoption Of Petitioner's Interpretation

Finally, the government contends (Br. 26) that interpreting Section 1608(a)(3) to allow service packets to be sent to embassy addresses would jeopardize the longstanding United States policy of refusing to recognize the validity of service, whether by mail or by personal delivery, at its embassies abroad. The government suggests (Br. 25-26) that, if the Court adopts that interpretation, it may be forced—or at least pressured—to accept service at its embassies.

The government's efforts to generate a justification for its position are unavailing. Under the government's logic, the FSIA should be interpreted to allow a litigant to serve a foreign state only by a form of service that the United States accepts on itself. But the government ignores the fact that it does not accept process *in any manner* contemplated by Section 1608(a)(3)—whether at an embassy or even at the State Department itself. The government takes the position that "service on the U.S. government is *only* proper when transmitted" in one of two ways: (1) "through diplomatic channels," *i.e.*, by the foreign ministry of the foreign country to the State Department, or (2) "through Article 5 of the Hague Service Convention by delivery to the U.S. Central Authority," referring to the Department of Justice's Office of International Judicial Assistance. Department of Justice, *Service of Process on the United States Government* 2 (Nov. 4, 2016) <tinyurl.com/usgservice>. The government's argument

here implies that no service would ever be permissible under Section 1608(a)(3)—an untenable result.

For its part, petitioner emphasizes the government's interest in reciprocal treatment under customary international law. See Br. 56. But as the government has previously explained, "generally accepted international practice * * * does not * * * provide for the more liberal means of service in Section 1608(a)(3)." U.S. Br. at 23, *Magness*, 247 F.3d 609 (5th Cir. 2001) (No. 00-20136). According to the government, as a matter of customary international law, the sole method for serving a ministry of foreign affairs is through diplomatic channels. See *id.* at 24. Whenever service is effected in any manner contemplated by Section 1608(a)(3), therefore, it goes further than customary international law. Yet the United States has not sought to alter the provision of the FSIA permitting service of process on a foreign minister by mail, nor has it yielded to any supposed pressure to accept such service of process itself.

In short, the government has no legitimate institutional interest in the outcome of the question presented. See U.S. Br. 1. Absent such an interest, one might well wonder why the United States is supporting Sudan in this case. In an unusual apologia at the beginning of its brief, the government states that it "deeply sympathizes with the extraordinary injuries suffered by respondents." Br. 2. But if there's one thing our veterans know, it's that actions speak louder than words. Particularly given this Administration's solicitude for veterans, its decision to side with a state sponsor of terrorism, against men and women who are seeking to recover for grievous injuries suffered in the service of our country, is inexplicable and distressing.

No matter. The plain language of the FSIA disposes of this case. Respondents correctly served petitioner

when they caused the service packet to be mailed to petitioner's foreign minister at the Sudanese embassy in the United States and petitioner accepted service. The judgment in respondents' favor is therefore valid, and the turnover orders are likewise enforceable. Respondents should be allowed to obtain compensation for their losses without further delay.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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